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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 447

SCHUYLKILL TRUST COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT AS TO JURISDICTION AND MOTION TO ADVANCE.

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PAGE

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Statute of the State of Pennsylvania validity of which is involved	2
Date of judgment, etc.	5
The nature of the case and ruling below	5
Cases believed to sustain jurisdiction	35
Exhibit "A"—Opinion of the Supreme Court of Pennsylvania of June 25, 1937	36
Motion to advance	43

Table of Cases Cited.

Bank of California v. *Richardson*, 248 U. S. 476	34, 35
Carter v. *Texas*, 177 U. S. 442	35
Commonwealth v. *Hazelwood Savings & Trust Co.*, 271 Pa. 375	18
Commonwealth v. *Mortgage Trust Co.*, 227 Pa. 163	21, 29
Commonwealth v. *Provident Trust Company of Philadelphia*, 40 Dauphin Co. Repts. 146, 41 Dauphin Co. Repts. 1, 319 Pa. 385	26
Commonwealth v. *Standard Oil Co.*, 101 Pa. 119	20, 29
Corry v. *Baltimore*, 196 U. S. 466	28, 35
Macallen Co. v. *Mass.*, 279 U. S. 620	34, 35
Missouri v. *Gehner*, 281 U. S. 313	34, 35
St. Louis, I. Mt. & So. Ry. Co. v. *Starbird*, 243 U. S. 592	35
Schuylkill Trust Co. v. *Commonwealth of Pennsylvania*, 296 U. S. 113	7, 11, 33, 34, 35

Statutes Cited.

Act of Assembly of Pennsylvania of June 13, 1907 (Pamphlet Laws 640), as amended by the Act of Assembly of Pennsylvania of July 11, 1923 (Pamphlet Laws, 1071), as amended by the Act of Assembly of Pennsylvania of May 7, 1927,

Page

(Pamphlet Laws 853), as amended by the Act of Assembly of Pennsylvania of April 25, 1929 (Pamphlet Laws 673) 2, 3, 5, 7, 8, 20, 34
Act of Assembly of Pennsylvania of April 25, 1929, Pamphlet Laws 677 ..... 17, 18
Act of Congress of July 17, 1916, c. 245; 39 Stat. 360, et seq., Sec. 16, Sec. 26 2
Act of Congress of August 29, 1916, c. 416, 39 Stat. 548, Sec. 11 2
Act of Congress of July 21, 1921, c. 51, 42 Stat. 145 2
Act of Congress of February 13, 1925, c. 229, 43 Stat. 936 1
Act of Congress of January 31, 1928, c. 14, 45 Stat. 54 1
Act of Congress of April 26, 1928, c. 440, 45 Stat. 466 ..... 1, 2
Constitution of the State of Pennsylvania, Art. II, Sec. 1 ..... 32, 34
Constitution of the State of Pennsylvania, Art. IX, Sec. 1 ..... 32, 34
Constitution of the United States, Art. I, Sec. 8, Clause 2 ..... 2, 34
Constitution of the United States, 14th Amendment, Sec. 1 ..... 7, 32
Laws of Pennsylvania of October 17, 1887 20
Revised Statutes of the United States, Section 3701 (31 U. S. C. 742) 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 447

SCHUYLKILL TRUST COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE FINAL JUDGMENT OF THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

STATEMENT AS TO JURISDICTION.

A.

Statutory Provisions Believed to Sustain Jurisdiction.

This case is reviewable by the Supreme Court of the United States on appeal under the Act of Congress of February 13, 1925, c. 229, 43 Stat. 936, Act of Congress of January 31, 1928, c. 14, 45 Stat. 54, which provides: "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal" and the Act of Congress of April 26, 1928, c. 440, 45 Stat.

466, because there was clearly drawn into question from the beginning of the litigation the validity of the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673 and the validity of the construction and application of the said State statute to the petitioner, the Schuylkill Trust Company, on the ground that the said State statute and the construction and application of the said State statute in the tax settlement made against the petitioner and embodied in the judgment entered against it by the Court of Common Pleas of Dauphin County affirmed by the final judgment of the Supreme Court of the State of Pennsylvania was repugnant to Section 3701 Revised Statutes of the United States, 31 U. S. C. Section 742, Act of Congress of August 29, 1916, c. 416, 39 Stat. 548, Sec. 11, Act of Congress of July 21, 1921, c. 51, 42 Stat. 145, Act of Congress of July 17, 1916, c. 245, 39 Stat 360, *et seq.*, Sec. 16, Sec. 26, Section 5219 Revised Statutes of the United States, Clause 2, Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the decision of the Supreme Court of Pennsylvania and its judgment rendered thereon against the petitioner was in favor of the validity of the said statute of the State.

B.

Statute of the State of Pennsylvania Validity of Which is Involved.

The State statute, the validity of which is involved is the Act of Assembly of Pennsylvania of June 13, 1907, Pamphlet Laws 640, as amended by the Act of Assembly of Pennsylvania of July 11, 1923, Pamphlet Laws 1071, as amended by the Act of Assembly of Pennsylvania of May 7, 1927, Pamphlet Laws 853, as amended by the Act of

Assembly of Pennsylvania of April 25, 1929, Pamphlet Laws 673. The pertinent provisions of the said Act of April 25, 1929, Pamphlet Laws 673, are:

"AN ACT

"To amend further an act, approved the thirteenth day of June, *Anno Domini* one thousand nine hundred and seven (Pamphlet Laws, six hundred and forty), entitled '* * * ,' by modifying the procedure for the settlement and payment of the State tax on the stock of title insurance and trust companies."

"SECTION 1. Be it enacted, &c., That * * * is hereby further amended to read as follows:

"SECTION 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth, one thousand eight hundred and seventy-four, and its supplements; for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances; and every company entitled to benefits of, and every company having any of the powers of, companies entitled to the benefits of an act, entitled 'An act conferring upon certain fidelity, insurance, safety deposit, trust, and savings companies the powers and privileges of companies incorporated under the provisions of section twenty-nine of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, Anno Domini one thousand eight hundred and seventy-four, and of the supplements thereto,' approved June twenty-seventh, one thousand eight hundred and ninety-five, commonly known as title insurance or trust companies, shall, on or before the (* * *) *fifteenth* day of (* * *) *March* in each and every year, make to the (* * *) *Department of Revenue* a report in writing, (* * *) setting forth the full

number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof as of December thirty-first preceding, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the (* * *) *Department of Revenue* to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares. (* * *) It shall be the duty of every such company, within a period of sixty days after the date of such settlement by the Auditor General, at its option, to pay the amount of said tax to the State Treasurer, *through the Department of Revenue,* from its general fund, or collect the same from its shareholders and pay over to the State Treasurer *through the Department of Revenue:* Provided (* * *) That upon the payment of the tax fixed by this act into the State Treasury, through the Department of Revenue, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth. *The procedure in case the Department of Revenue be not satisfied with the report made by any title insurance or trust company, and the penalties for failing to make such report and pay the tax, shall be as provided by law.*

"Section 2. This act shall become effective on the first day of July, one thousand nine hundred and twenty-nine.

"Approved—The 25th day of April, A. D. 1929.

"John S. Fisher."

C.

Date of Judgment, etc.

The date of the judgment sought to be reviewed is June 25, 1937, and the date upon which the petition for reargument was refused by the Supreme Court of the State of Pennsylvania was July 7, 1937, notice of which refusal was given to the petitioner July 12, 1937.

D.

The Nature of the Case and Ruling Below.

The petitioner was the appellant and the Commonwealth of Pennsylvania was the appellee in the appeal to the Supreme Court of Pennsylvania, which is the highest and the court of last resort of said State, from the judgment of the Court of Common Pleas of Dauphin County making a settlement of tax against the petitioner for the tax and calendar year ending December 31, 1930, fixing the liability of the petitioner for a tax in the amount of $1,441.39 under the alleged authority of an Act of Assembly of the Commonwealth of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, Laws of Pennsylvania, 1929.

The petitioner, Schuylkill Trust Company, a domestic corporation, to which letters patent were issued upon October 17, 1887, filed its report for the twelve months ending December 31, 1930, in the Department of Revenue as required by the Act of Assembly of Pennsylvania of April 25, 1929, Pamphlet Laws 673, and that thereupon the Department of Revenue made a settlement of tax against the said petitioner under the alleged authority of the said Act of Assembly in the amount of $2,306.08 upon January 25, 1932, which was approved by the Department of the Auditor General January 26, 1932.

Subsequent thereto and in due course a petition for resettlement was filed which was refused by the said Departments of Revenue and of the Auditor General. Thereupon a petition for review was filed with the Board of Finance and Revenue, which Board made a resettlement of the said tax under the alleged authority of the said act upon January 26, 1933, whereby tax was imposed in the amount of $2,290.14, from which resettlement the petitioner took an appeal to the Court of Common Pleas of Dauphin County.

Hearing was had in the said Court of Common Pleas of Dauphin County upon the said appeal upon an agreed statement of facts and after argument, said court upon October 19, 1933, affirmed the settlement of tax made by the Board of Finance and Revenue and directed the entry of judgment *nisi* in the amount of $1,719.71, together with costs and Attorney General's Commission thereon in a total amount of $1,863.17, which judgment was made absolute November 24, 1933 (R. 4a-18a, 18a-24a, 85a-103a, 105a).

Thereupon and in due course the petitioner took an appeal to the Supreme Court of Pennsylvania, which is the highest and the court of last resort of said State, from the judgment of the Court of Common Pleas of Dauphin County. That upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania, which court upon June 30, 1934, filed its opinion and directed the entry of judgment affirming the judgment of the Court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Chief Justice Frazer.[1]

In due course and in accordance with the law of the State of Pennsylvania and the rules of the Supreme Court of Pennsylvania, your petitioner filed its petition for reargu-

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[1] *Commonwealth of Pennsylvania* v. *Schuylkill Trust Co., Appellant,* Supreme Court of Pennsylvania, Middle District, No. 19, May Term, 1934 (Opinion, R. 106a).

ment July 21, 1934, which was denied by the said court upon September 25, 1934. Your petitioner thereupon, to wit, November 26, 1934, presented to the Supreme Court of Pennsylvania its petition for the allowance of an Appeal to the Supreme Court of the United States, which was refused by the Supreme Court of Pennsylvania November 28, 1934.

Subsequent thereto and in due course your petitioner presented its petition for the allowance of an appeal to the Supreme Court of the United States which was allowed December 14, 1934, by Roberts, Associate Justice, Supreme Court of the United States. (*Schuylkill Trust Company, Appellant*, v. *The Commonwealth of Pennsylvania*, Supreme Court of the United States, No. 3, October Term, 1935 (296 U. S. 113) (Opinion, R. 110a).)

The appeal was heard before the Supreme Court of the United States and upon November 11, 1935, the opinion of the said court was delivered and filed wherein and whereby the judgment of the State court was reversed and the cause remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States (296 U. S. 113). The judgment of the State court was reversed because it was based upon the Act of April 25, 1929, Pamphlet Laws 673, which was discriminatory in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and United States Revised Statutes, Section 5219, and the United States statutes recited in the assignments of error.

Upon February 11, 1936, the Commonwealth of Pennsylvania presented a petition to the Court of Common Pleas of Dauphin County praying the court to revise its original judgment entered November 24, 1933, which had been affirmed by the State Supreme Court June 30, 1934, and reversed by the Supreme Court of the United States November 11, 1935, by entering judgment in favor of the Common-

wealth and against this petitioner in the amount of $2,334.57 for tax imposed upon the full actual net asset value of the shares of stock of the petitioner under authority of the first proviso of the Act of June 13, 1907, Pamphlet Laws 640, and that such court issue a rule upon this petitioner to show cause why such judgment should not be entered. February 11, 1936, the court issued a rule upon this petitioner to show cause why the judgment prayed for should not be entered.

To such rule so made by the Dauphin County Court the petitioner filed a demurrer praying the judgment of the court whether it should be required to make any answer to the petition and that it be hence dismissed with its reasonable costs in this behalf sustained. The causes of demurrer are fully set forth in the demurrer. The grounds thereof were, *inter alia*, that the Commonwealth was not entitled to the relief prayed for, that there was no authority in the Court of Common Pleas of Dauphin County to make a tax settlement or to make a tax settlement under the Act of June 13, 1907, Pamphlet Laws 640, there being no such law in force in the State of Pennsylvania either at the time of the petition or during the tax and calendar year for which the tax settlement was originally made and for which the petition prayed that such settlement be made, and that the same constitutional defects which the Commonwealth admitted made void the Acts of April 25, 1929, Pamphlet Laws 673, May 7, 1927, Pamphlet Laws 853, and July 11, 1923, Pamphlet Laws 1071, made invalid and void the Act of June 13, 1907, Pamphlet Laws 640 (R. 136a).

Oral argument was had upon the petition and demurrer. The Commonwealth contended that the Act of April 25, 1929, Pamphlet Laws 673, was unconstitutional and void and had been so held by the Supreme Court of the United States and that the prior acts of May 7, 1927, *supra*, and July 11, 1923, *supra*, were likewise unconstitutional and void and that therefore a revision of the judgment should be made by the

entry of judgment against the Schuylkill Trust Company under the first proviso of the Act of June 13, 1907, Pamphlet Laws 640, by denying all deductions. The petitioner contended that judgment should be entered in its favor together with costs. The Dauphin County Court overruled the demurrer filed by the petitioner, without opportunity to file an answer to the petition, by such court's entering a judgment *nisi* upon April 20, 1936, imposing a tax together with interest and Attorney General's Commission in the amount of $1,801.03 less costs expended in the Federal Court and allowed by said court in the amount of $344, the total judgment entered being $1,457.03 (R. 152a). The judgment was based upon the same Act of April 25, 1929, Pamphlet Laws 673, after the court had amended it by allowing deductions in addition to those written in the statute by the legislature.

Thereafter in due course the petitioner filed exceptions to the conclusions of law and judgment of the court, there being no dispute as to the facts which were set forth in the stipulations of facts filed at the time of the trial of the cause and before the entry of the original judgment dated November 24, 1933 (R. 105a) (Exceptions, R. 183a-208a, 217a, 218a).

January 18, 1937, the Dauphin County Court filed an opinion entitled "Opinion Upon Exceptions" wherein it states that it considered certain exceptions filed, that it had sustained some ~~and~~ overruled and modified others and thereupon proceeded to enter a new and differently formulated and calculated judgment in the amount of $1,719.45, from which was deducted the hereinbefore referred to amount of costs in the sum of $344, the judgment entered being $1,375.45. The new formula and calculation were compounded of values, some stated to be "book value" and some "market value", a compound of figures and facts not in evidence and not included in the stipulation of facts. The

court in its opinion admits that its new and differing judgment is founded upon facts other than those upon which the tax settlement and the judgments of the State and Federal courts were founded.

Subsequent thereto, finding that it had not ruled upon all of the exceptions, the court, upon January 22, 1937, filed another opinion entitled "Modified Judgment" wherein it is stated that the additional exceptions were overruled and proceeded to set forth the grounds of its final judgment which it entered upon such date, the judgment in this opinion being the sum of $1,441.39 which was the amount of the tax, interest and Attorney General's commission, $1,785.39, less the hereinbefore referred to Federal court costs of $344. The formula and calculation upon which this new judgment was based are a compound of facts not in evidence as was the basis of the earlier judgment directed to be entered January 18, 1937 (R. 221a, 222a).

Thereupon and in due course the petitioner took an appeal to the Supreme Court of Pennsylvania which is the highest and the court of last resort of said State, from the judgment of the Court of Common Pleas of Dauphin County. Upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania which court upon June 25, 1937, filed its opinion and directed the entry of judgment affirming the judgment of the Court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Justice Stern.

In due course and in accordance with the law of the State of Pennsylvania and the rules of the Supreme Court of Pennsylvania, your petitioner filed its petition for reargument July 2, 1937, and upon July 12, 1937, your petitioner was notified that reargument had been refused July 7, 1937.

The settlement of tax made by the Court of Common Pleas of Dauphin County under the alleged authority of

the said State statute of April 25, 1929, Pamphlet Laws 673, and the mandate of the Supreme Court of the United States issued in the case of *Schuylkill Trust Company, Appellant,* v. *The Commonwealth of Pennsylvania,* No. 3, October Term, 1935, 296 U. S. 113, which settlement of tax was embodied by the said court in a judgment entered against your petitioner January 22, 1937, which judgment was affirmed by the Supreme Court of Pennsylvania June 25, 1937, was made in accordance with the following method and calculation:

"Statement"

"Capital stock and undivided profits (book value)		$440,667
Appreciation		25,247
Capital stock and undivided profits (market value)		$446,914
Less:		
(a) Full deduction for shares of National Bank	$20,202	
(b) Proportionate deduction for U. S. Securities and exempt shares of stock, $\frac{418,650}{2,158,045} \times 286,121 + 35 =$	55,541	75,743
Total value of capital stock		$391,171"

(Manifestly the term, "Total", should be Taxable.)

The tax was calculated upon the said amount of $391,171 at the rate of five mills with a resultant tax in the amount of $1,955.85 upon which credit was given for a payment on account of $570.43, leaving a balance due the Commonwealth in the amount of $1,385.42 (R. 221a).

Upon such amount of $1,385.42 interest was calculated from April 8, 1933, to January 22, 1937, in the amount of $314.95, making a total of $1,700.37. Attorney General's commission was calculated upon the said sum of $1,700.37 in the amount of $85.02, making a total of $1,785.39. From this sum so claimed to be due in the amount of $1,785.39 there was deducted:

> "Less Costs allowed appellant in the Mandate of the Supreme Court of the United States, 344.00,"

leaving a balance of $1,441.39, which was the amount of the final judgment directed to be entered by the Dauphin County Court January 22, 1937 (R. 223a).

In order that the meaning, intent and effect of this method of calculation applied and embodied in the final judgment of January 22, 1937, and its relationship to the prior judgments entered by the same court in this same case embodying differing methods of settlement and calculations may be made clear, they will be set forth in the order of their sequence:

The method of settlement applied by the taxing officials and affirmed by the original judgment of the Dauphin County Court entered November 24, 1933, and affirmed by the Supreme Court of Pennsylvania June 30, 1934, is set forth in the stipulation of facts (R. 19a). This method of settlement and the judgment consequent upon its application was considered by the Supreme Court of the United States and held void, for the reason that such court held the statute under authority of which it was applied discriminatory and void. By this method of settlement, formula and calculation the taxing officials of the Commonwealth of Pennsylvania determined the actual value of each and all of the assets of the petitioner. They determined the actual value of the amount of capital stock paid in, the surplus and undivided profits of the petitioner,

which was the actual value of the net assets of the petitioner and was the difference between the actual value of the total assets and the amount of the liabilities. The actual value of the total assets was fixed at $3,755,882. The actual value of the amount of the capital stock paid in, the surplus and the undivided profits was fixed at $466,914. Included among the total assets were shares of stock issued by corporations which, under the express language of the statute, were exempted from the tax imposed. These shares of stock are described and classified in the statute as shares of stock issued by corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares. All of the shares of stock included within such class of shares exempted by the State statute were valued at $155,989, included within which class were Philadelphia National Bank shares of the value of $20,202. These shares are listed in Exhibit "2" which was made a part of Specification of Objection 7 in the appeal taken to the trial court and are listed also in the stipulation of facts filed with such court (R. 10a, 14a, 15a, 22).

The taxing officials then determined the value at which these exempt shares of stock of the actual value of $155,989 were taxed or relieved from tax or the capital stock of the corporations which issued them were taxed or relieved from tax under other taxing statutes of the State and fixed such value at $71,373, included within which were the said Philadelphia National Bank shares (R. 13a, 14a, 23a, 30a). They held that these shares of stock of the actual value of $155,989 were to be deducted from the amount of the capital stock paid in, the surplus and undivided profits at such portion of the said $71,373, as the amount of the capital stock paid in, the surplus and undivided profits bore to the value of the total assets and by such method fixed the amount of

such deduction to be $8,886. The view of the taxing officials and the State courts was that the purpose of the exemption of such shares of stock under the language of the statute was to avoid double taxation (R. 80a, 84a) and therefore since such shares of stock of the actual value of $155,989 had either been taxed or relieved from tax under other taxing statutes of the State or the corporations which issued them had been taxed or relieved from tax upon their capital stock under other taxing statutes of the State, the petitioner was not entitled to a deduction of the full value of these shares in the amount of $155,989. Thus did the State courts in their affirmation of the tax settlement and their construction and application of the State statute deny the claim of the petitioner for the deduction of the whole actual value of the Philadelphia National Bank shares in the amount of $20,202 and the whole actual value of other tax-fre shares in the total amount of $155,989.

The calculation in application of the theory of the taxing officials of the Commonwealth of Pennsylvania construing and applying the statute is set forth in the Stipulation of Facts (R. 18a) and is as follows:

$$441{,}668 + 25{,}247 - \left(\frac{467{,}714}{3{,}755{,}882} \times 71{,}373\right) = 458{,}028.$$

This calculation consists of the following elements: The sum, 441,667 + 25,247 or 466,914, was the actual value of the amount of the capital stock paid in, the surplus and undivided profits. From this sum of 466,914 was deducted the result of the calculation within the brackets, 8,886, with a resultant taxable value of 458,028. The numerator of the fraction, 467,714, is the amount of capital stock paid in, the surplus and undivided profits. (There was a mistake in addition. The numerator 467,714, should have been 466,914. See Stipulation of Facts, R. 21a; Statement of

Counsel for the Commonwealth, (R. 29a, 30a). The denominator of the fraction, $3,755,882, is the value of the total assets. The multiplicand, $71,373, is the taxed and exempt value of the tax-free shares of the actual value of $155,989, determined by the taxing officials as hereinbefore set forth. The portion of the said 71,373 subtracted as the result of the method of settlement and calculation was 8,886 and resulted in the sum of $458,028 which was held to be the taxable value. The rate of tax, five mills, was thereupon applied to the said sum of $458,028 with a resultant tax settled against the petitioner in the amount of $2,290.14.

There were included within the total assets of the petitioner of the value of $3,755,882 national bank shares of the value of $20,202 which were included also within the class of exempt assets tax free under the statute of the whole actual value of $155,989 (R. 10a, 15a, 22a).

The only deductions allowed under the tax settlement made as the statute was construed and applied by the taxing officials and State courts were a deduction of the amount of the liabilities from the amount of the total assets which resulted in a fixing of the amount of the capital stock paid in, the surplus and undivided profits at $466,914 and a deduction from this latter sum of the said sum of $8,886, whereby a taxable value was determined in the amount of $458,028. The deduction of the full value of the said described shares of stock ($155,989) was not allowed. The deduction allowed by reason of their ownership was $8,886, which is 5.6 per centum of their whole value. There was no deduction of the full value of national bank shares of the value of $20,202, which was included and listed in the said class of shares (R. 10a, 14a, 15a, 22a). The only deduction allowed was such portion of the said $20,202 as the amount of capital stock paid in, the surplus and undivided profits

bore to the total assets, to wit, a deduction of $2,515, $\left\{\frac{467,714}{3,755,882} \times 20,202 = 2515\right\}$, which 12.4 per centum of their whole actual value.

Among the total assets of the petitioner of the value of $3,755,882 were United States securities of the value of $134,907, Philippine Islands bonds of the value of $10,900 and Joint Stock Land Bank bonds of the value of $5,400. No deduction whatsoever was allowed by reason of the petitioner's ownership of these assets.

The State courts in affirming the settlement made by the taxing officials held that the shares of stock to be deducted under the express language of the statute were to be deducted to the extent of such portion of their value which was taxed or exempted from tax under other State taxing statutes (in the instant case, $71,373) as the amount of the capital stock paid in, the surplus and undivided profits bore to the total assets (in the instant case in the amount of $8,886) for the reason, said the trial court, that under the statute "The sole purpose of this exemption clause was to avoid double taxation" (R. 80a, 84a). The State courts construed and applied the statute as directing the deduction of $8,886, 5.6 per centum of the whole actual value ($155,989) of certain assets in order not to tax such portion twice, thereby construing and applying the statute as imposing a tax upon all assets not deducted, it being self-evident that if $8,886 of the value of assets were to be deducted in order to avoid double taxation, such assets as were not deducted were, in the opinion of the State courts, to be taxed once and that such was the intent and purpose of the statute. Hence it is that the State courts construed and applied the statute as imposing a tax upon the assets

of the trust company less certain prescribed deductions and determined the amount of the tax liability by reason and on account of the kind of assets owned by the trust company and not upon the shareholders' interest in the shares of stock issued by the trust company.

In so holding the State courts ignored the fact that there was included within the said class of exempt shares of stock the national bank shares of the value of $20,202 and that the State was without authority to make such shares the basis for any other and further taxation, the petitioner being subject to tax upon such shares at their actual net asset value as the owner thereof under the Pennsylvania Act of April 25, 1929, Pamphlet Laws 677. With reference to the United States securities, the Philippine Islands bonds and the Joint Stock Land Bank bonds, the State courts admitted that they were non-taxable assets, that the State was without authority to impose a tax upon them but held that they were not taxed, for the reason that, said they, the tax imposed by the said Act of April 25, 1929, Pamphlet Laws 673, was a tax upon shares *qua* shares, a tax upon the shareholders' interest in the shares issued by the petitioner, and not a tax upon any of the assets owned by the petitioner.

The petitioner contended that the tax was not a tax upon shares as shares, that the statute expressly exempted certain assets owned by the trust company at their whole actual value and imposed the tax solely with reference to remaining assets and that therefore under the tax settlement there was not only a taxation of such non-taxable securities but also a discrimination against them, by reason of the exemption allowed to certain favored assets described in the statute. The petitioner contended that the proper method of taxation in order to construe the State statute in conformity with the Acts of Congress and the Constitution of Pennsylvania and of the United States and thus

carry out the intent of the State legislature was to determine the taxable value to which the rate of tax was to be applied by deducting from the total assets an amount of assets sufficient to cover liabilities, the full value of shares of stock of corporations exempted under the statute, including therein the full value of the national bank shares, and the full value of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, and that when such method is applied the amount of the tax is $570.43, which the petitioner paid (see Defendant's Request for Conclusion of Law 18, R. 43a, 24a). The petitioner contended also that, in addition to the fact that the statute as written and construed and applied to it imposed a tax upon assets, such statute as construed and applied to it discriminated against the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds because they were not deducted and eliminated from consideration at their full actual value, although there was a deduction made of a portion of the value of the tax-free shares of stock exempted under the express language of the statute and that consequently the immunity of such United States securities and such bonds and Federal instrumentalities was infringed and that the national bank shares being subject to tax under the Pennsylvania statute of April 25, 1929, Pamphlet Laws 677, could not be made the basis of any other or further taxation and therefore must of necessity be deducted at their full value and eliminated entirely from consideration in determining any tax imposed under the Act of April 25, 1929, Pamphlet Laws 673, the statute under consideration in the instant case.

Though the State Supreme Court affirmed the judgment of the trial court and held, upon authority of its earlier decision in the case of *Commonwealth* v. *Hazelwood Savings & Trust Co.*, 271 Pa. 375 (1921), construing and apply-

ing the Act of June 13, 1907, Pamphlet Laws 640, that the petitioner was not entitled to a deduction of the whole value of the shares of stock ($155,989) made tax-free under the express language of the Act of April 25, 1929, Pamphlet Laws 673, and thus denied, in its construction and application of the said Act of 1929, *supra*, the claim of the petitioner for the deduction of the full value of the national bank shares ($20,202) owned by it, the Supreme Court said that the question as to the claim and right of the petitioner for the deduction of the whole value of the national bank shares was not raised in the original specification of objections filed with the trial court, was not discussed by the trial court and therefore would not be considered by it. This statement and conclusion of the State Supreme Court was erroneous and was so held by the Supreme Court of the United States (296 U. S. 113). The United States Supreme Court held that the question was properly raised [2] in the State courts and in the Federal court, that the national bank shares as well as the United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds were discriminated against the subjected to tax, that they were included in the measure of the tax and that therefore the statute was discriminatory in violation of the United States statutes recited in the assignments of error and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The State Supreme Court in its opinion filed in support of its last judgment does not hold that this question was not properly raised by the petitioner and the appellant in the State courts. The ruling of the

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[2] See Assignments of Error and Statement of Questions Involved filed in the Supreme Court of Pennsylvania (Supreme Court of Pennsylvania, Middle District, No. 19, May Term, 1934), printed in Transcript of Record, Supreme Court of the United States, October Term, 1935, No. 3, pp. 72-90.

United States Supreme Court upon this point being set forth at length in the opinion filed, the contentions of the petitioner with reference thereto are not repeated herein.

Having held that the tax imposed by the said Act of 1929 was a tax upon the shares of stock issued by the petitioner *qua* shares and that it was a tax upon the shareholders' interest in such shares, the State courts held that such tax was imposed upon shares owned by non-residents and their interest as well as those owned by residents of the State. The petitioner contended that if the tax was a tax upon shares *qua* shares and upon the shareholders' interest in the shares, the State of Pennsylvania was without authority to impose such tax upon the non-resident shareholders for the reason that the *situs* of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The petitioner contended that the decision of the Supreme Court of the United States in the case of *Corry* v. *Baltimore*, 196 U. S. 466 (1905), did not support the conclusion of the State courts, the petitioner having been incorporated under the laws of Pennsylvania October 17, 1887, (R. 24a), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this State the *situs* for the taxation of shares of stock owned by non-residents, the law of the State as declared by the Supreme Court being to the contrary. (*Commonwealth* v. *Standard Oil Co.*, 101 Pa. 119, 133 (1882).) The petitioner contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case is an amendment, was construed by the

Supreme Court of Pennsylvania, in sustaining its constitutionality as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied (*Commonwealth* v. *Mortgage Trust Company*, 227 Pa. 163, 183 (1910)), and therefore under the authority of the decision of the Supreme Court of the United States in the cited case of *Corry* v. *Baltimore, supra*, there was no authority in the State to impose a tax upon the shares owned by non-residents.

Subsequent to the issuing of the mandate of the Supreme Court of the United States the Dauphin County Court directed the entry of a judgment against your petitioner in the amount of $1457.03 upon April 20, 1936, which it held was entered in compliance with such mandate (R. 152a). The amount of such judgment, it was said, was determined in accordance with the method of settlement set forth in the judgment itself which was an erroneous application of the principles set forth in its opinion.

The Dauphin County Court held that the statute was unconstitutional and void as it had been applied theretofore but that it had the power to allow additional deductions which the State Supreme Court had theretofore held the Legislature did not intend to allow and had not allowed by this statute. The Dauphin County Court held also that by allowing such additional deductions in the manner in which it was allowing them in the instant case not only was the statute made constitutional but there was also a compliance with the mandate of the Supreme Court of the United States.

The Dauphin County Court held that the statute was to be applied by the application of the following method of settlement:

(1) That the full market value, that is, the actual value of national bank shares and Federal Reserve Bank shares

was to be deducted from the amount of capital stock paid in, surplus and undivided profits (the net assets) in all cases, irrespective of whether or not they were investments of the amount of capital stock paid in, surplus and undivided profits.

(2) That neither the shares of stock defined in the said statute and exempted from tax by the language of such statute nor the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and other obligations of the United States Government and its agencies and instrumentalities were to be deducted from the amount of capital stock paid in, surplus and undivided profits at their full actual value unless the trust company-owner of such assets established as a fact that they were wholly investments of the amount of capital stock paid in, surplus and undivided profits, that if it were not shown that they were wholly such investments, then in the case of such assets, the court said, "a proportionate deduction is to be made."

(3) That the proportionate deduction was to be made according to the following formula (R., 150a, 151a):

> "(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for which a full deduction has been made; (b) the denominator to consist of the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made; (c) such fraction to be multiplied by the book value of the securities which are to be apportioned; (d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned."

(4) That in the case of your petitioner, since it owned Philadelphia National Bank shares of the value of $20,202,

the full value thereof was to be deducted, though it had not been shown that the national bank shares were wholly investments of capital stock paid in, surplus and undivided profits, and that, since the petitioner had not shown that United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of an actual value of $151,207 and the shares of stock defined and exempted by the language of the statute exclusive of the said national bank shares of an actual value of $135,787 were purchased, were wholly investments of the amount of capital stock paid in, surplus and undivided profits, a proportionate deduction was to be made in the manner outlined.

At this point the Dauphin County Court was confronted with the fact that this method of settlement could not be applied to the petitioner because there was nothing in the record to show book values of assets, what was meant by book values, what was meant by permanent investments and what the permanent investments owned by the petitioner were and their book value was. Nevertheless the Dauphin County Court proceeded as the statement of the calculation of its judgment shows in the record (R. 152a). It applied the actual values of each and all assets though its formula outlined in its opinion was to the contrary. The judgment calculated was not determined in conformity with the method of settlement which the court approved and which it held complied with the mandate of the Supreme Court of the United States. It fixed the actual value of the amount of capital stock, surplus and undivided profits at $466,914; it deducted the actual value of the national bank shares in the amount of $20,202; it allowed a deduction of a portion of the actual value of the United States securities and a portion of the actual value of the remaining exempt shares of stock of a total value of $286,994 in the amount of $34,318

(R. 152a). It arrived at such sum of $34,318 by the application of the following fraction:

$$\frac{446,712}{3,735,680} \times 286,944.$$

The numerator of the fraction, $446,712, is the actual value of the amount of capital stock paid in, surplus and undivided profits, $466,914, minus the value of the national bank shares, $20,202.

The denominator of the fraction, $3,735,680, is the actual value of all the assets as shown in the stipulation of facts (R. 19a), $3,755,882, less the actual value of the national bank shares, $20,202.

The multiplicand of the fraction, $286,944 (should be $286,994, see R. 102a), is the actual value of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, $151,207, plus the actual value of the shares of stock defined in the statute, $155,989, exclusive of the actual value of the national bank shares (R. 22a) which had been deducted at their actual value of $20,202.

As the result of the foregoing there was deducted from the actual value of the amount of the capital stock paid in, surplus and undivided profits, $466,914, the full actual value of the national bank shares, $20,202, and the sum of $34,318 which was a portion of the actual value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the exempt shares of stock defined and exempted by the language of the statute exclusive of the actual value of the national bank shares of a total value of $286,994, the total deduction being $54,520, making the taxable value of the capital stock $412,394, with a resultant tax in the amount of $2,061.97 (see R. 152a).

Thereafter the court, seeing that it had determined a judgment by a method of calculation which did not apply

the method of settlement which it had held in its opinion was a constitutional interpretation, construction and application of the statute and a compliance with the mandate of the Supreme Court of the United States and finding that there was no evidence of record as to book value of assets of the petitioner, no evidence as to what constituted permanent investments, what the permanent investments were which were owned by the petitioner and what the book values of permanent investments were (see Stipulation of Facts and Supplemental Stipulation of Facts, R. 18a-24a), proceeded to change the valuations set forth in the method of calculation whereby it had in its prior judgment of April 20, 1936, determined the amount of the proportionate deduction for the exempt shares of stock defined in the language of the statute and the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds (see Opinion, R. 219a-222a). The court changed the numerator of the fraction from $446,712 to $418,650, which latter sum it says in its opinion "is obtained by adding capital, $132,625, surplus $230, undivided profits $79,042, total $441,667, which are the book values less the book values of National Bank Shares, $23,017, making $418,650" (R. 219a). The court changed the denominator of the fraction from $3,735,680 to $2,158,045, which it says in its opinion (R. 220a) is "the book value of permanent investments less the book value of those shares, if any, for which a full deduction has been made." The court said "that the permanent investments amount of $2,181,062, and after deducting the book value of the National Bank shares, $23,017, we get the denominator, $2,158,045." The court changed the multiplicand, $286 44 ($286,994) to $286,121. The court said (R. 220a), "Instead of the multiplicand used by us, $286,994, the correct multiplicand is $286,121. This error is accounted for by the fact that the tax value of the Pennsyl-

vania Power & Light Company shares was taken instead of the book value, which is $800 less and the total book value of the exempt items amounts to $286,121.38. There was a mistake of $73.00 in that calculation. So that correctly adding the book value of the shares which are apportioned, the amount is $286,121 instead of the figure $286,994."

After having made such alterations in the figures applying its formula the court proceeded to add the sum of $35, which latter sum it says is the "appreciation which should be added to the result of the fraction * * *." As a result of the foregoing the proportionate deduction calculation becomes (R. 220a):

$$\frac{418,650}{2,158,045} \times 286,121 + 35 = 55,541.$$

The first fact to be noted is that there is no evidence whatsoever upon which to base any of the figures embodied within this new proportionate method of calculation. There were no such facts or factors as book values of assets of the petitioner, what constituted permanent investments, what the permanent investments of the petitioner were, if any there were, what their book or actual value was, considered by the taxing officers who made the tax settlement against your petitioner. This is demonstrated by the record itself and is admitted by the Dauphin County Court and the State Supreme Court in the opinions filed in the case of *Commonwealth* v. *Provident Trust Company of Philadelphia*, 40 Dauphin Co. Repts. 146, 41 Dauphin Co. Repts. 1, 319 Pa. 385, in which case it was said that in the year 1930, the year here in question, all settlements and methods of settlement and calculations were based upon actual values (40 Dauphin, *supra*, 169). There were no such facts or factors before the Dauphin County Court in the trial of this case and the entry of its original judgment,

before the Supreme Court of the State of Pennsylvania when it entered its final judgment June 30, 1934, or before the Supreme Court of the United States. Not only was there no such evidence but there was no hearing nor an opportunity for a hearing given the petitioner upon such matter. The truth of these statements is established by the opinions of the court itself which appear of record (R. 145a, 219a).

As shown, the application of the new calculation fixes a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and a portion of the value of the shares of stock exempted under the statute, exclusive of the national bank shares, of the total value of $286,994 at $55,541. Accordingly the Dauphin County Court upon January 18, 1937, applied its new calculation (R. 221a, 222a) and as a result thereof there was deduction from the actual value of the amount of the capital stock paid in, surplus and undivided profits, $466,914, the actual value of the national bank shares, $20,202, the recited proportionate deduction of $55,541 or a total deduction of $75,743, thereby fixing the taxable value at $391,171 with a resultant tax in the amount of $1,955.85.

Thereafter, finding that it had not ruled upon all of the exceptions filed by the petitioner, the court entered its final judgment upon January 22, 1937, in the amount of $1,441.39 (R. 222a, 223a). This final judgment differs from the judgment of $1,375.45 entered January 18, 1937, solely in the amount of the interest calculation and Attorney General's Commission. All three of the judgments entered, the judgment of April 20, 1936, the judgment of January 18, 1937, and the final judgment of January 22, 1937, allow as a deduction the costs which the mandate of the Supreme Court of the United States stated was to be paid to the petitioner in the amount of $344. These costs, as the final judgment

shows, are allowed as a deduction from a sum which includes interest calculated to January 22, 1937, as a result of which not only was a judgment entered against the petitioner for taxes but the petitioner was charged interest upon costs which were owing to it from the date of the decision of the Supreme Court of the United States, November 11, 1935, to January 22, 1937.

The Supreme Court of the State of Pennsylvania affirmed the final judgment which the lower court entered January 22, 1937, in favor of the Commonwealth and against the petitioner in the amount of $1441.39 and filed its opinion June 25, 1937. Its opinion is nothing more than an approval of everything done by the Dauphin County Court.

The Dauphin County Court and the State Supreme Court held that the tax imposed by the said statute was a tax upon the shares issued by the petitioner *qua* shares, that it was a tax upon the shareholders' interest in the shares, that it was imposed upon the shares owned by non-residents and their interest in such shares as well as those owned by the residents of the state. The petitioner contended that if the tax was a tax upon shares *qua* shares and upon the shareholders' interest in the shares, the State of Pennsylvania was without authority to impose such tax upon the non-resident shareholders for the reason that the *situs* of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The petitioner contended that the decision of the Supreme Court of the United States in the case of *Corry* v. *Baltimore*, 196 U. S. 466 (1905), did not support the conclusion of the State courts, the petitioner having been incorporated under the laws of Pennsylvania October

17, 1887 (R. 24a), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this State the *situs* for the taxation of shares of stock owned by non-residents, the law of the State as declared by the Supreme Court being to the contrary. (*Commonwealth* v. *Standard Oil Co.*, 101 Pa. 119, 133 (1882).) The petitioner contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case, is an amendment, was construed by the Supreme Court of Pennsylvania, in sustaining its constitutionality as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied (*Commonwealth* v. *Mortgage Trust Company*, 227 Pa. 163, 183 (1910)), and therefore under the authority of the decision of the Supreme Court of the United States in the cited case of *Corry* v. *Baltimore, supra*, there was no authority in the State to impose a tax upon the shares owned by non-residents.

The petitioner also contended that the Supreme Court of the United States in its decision filed November 11, 1935, had held that none of the shares of stock issued by your petitioner was taxable for the reason that the State statute of 1929 was discriminatory and therefore unconstitutional and void and that it had so declared in its opinion.

The sole difference between the original judgment entered by the Dauphin County Court November 24, 1933, affirmed by the opinion and judgment of the State Supreme Court June 30, 1934, from which judgment the appeal was taken to the Supreme Court of the United States, and this latest judgment of the State Supreme Court which is said to be a compliance with the mandate of the Supreme Court of the United States is an increase in the amount of the deductions

allowed by reason of the petitioner's ownership of national bank shares, United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, the deduction allowed being a deduction of the full value of the national bank shares and a deduction of a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute, such portion being 19 per centum of their entire value.

The State courts now hold that the statute as it is now construed and applied in the tax settlement embodied in the judgment entered against the petitioner is constitutional and complies with the mandate of the Supreme Court of the United States. The State courts adhere to the conclusion that under the new method of settlement there is no taxation of the United States securities, Philippine Islands, bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute and no discrimination against such assets though the State courts adhere to the application of the "proportionate" method of settlement whereby only a portion of non-taxable and exempt assets are deducted and wherein the entire value of non-taxable assets such as national bank shares and Federal Reserve Bank shares are deducted despite the fact that there is no distinction or difference in degree of exemption and non-taxability between these various assets. The petitioner contended that the discrimination between these assets is manifest and the violation of the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States is clear.

The State courts hold that they have the power to amend the statute by allowing additional deductions and changing the method of settlement though such amendment of the

statute and change in the method of settlement are contrary to every decision of the State courts to and including the final decision of the State Supreme Court filed June 30, 1934, from which the first appeal was taken to the Supreme Court of the United States. The State courts hold that the tax is a tax upon shares *qua* shares and that there is constitutional authority to tax the shares of non-resident shareholders though it is manifest that the statute is a revenue statute and not a statute regulating the issuing of the shares of stock of a domestic corporation.

The petitioner contended that the "proportionate" method of settlement whereby a portion of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted under the express language of the statute was deducted imposes tax upon such securities, bonds and shares of stock, that such taxation is the necessary result of the application of such method of settlement, that the formula and calculation includes the value of such assets in the denominator of the fraction used to determine the portion of such assets to be deducted, the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted in the express language of the statute being included within the denominator of the fraction set forth in the judgment entered against the petitioner, to wit, $\frac{418{,}650}{2{,}158{,}045}$, it being self-evident that the larger the denominator of such fraction the less will be the amount of the deduction allowed and the less the amount of the deduction the larger the amount of tax imposed.

The petitioner contended that the discrimination against the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted by the express language of the statute is

likewise self-evident, for the method of settlement approved in the Girard Trust Company case (R. 182a) and in the instant case (R. 221a) requires that the full value of national bank shares and Federal Reserve Bank shares, both of which are shares of stock which are included within the shares of stock defined, described and exempted under the express language of the statute, be deducted in all cases and only a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the other members of the class of shares of stock defined and exempted under the express language of the statute is required to be deducted unless it can be established as a fact by the trust company-owner that such assets are wholly investments of the amount of capital stock paid in, surplus and undivided profits. The petitioner contended that it is self-evident that if the entire value of national bank shares and Federal Reserve Bank shares be deducted in order that they might not be included in the measure of the tax, a deduction of the entire value of all non-taxable and exempt assets is required in order that they be not taxed and be not discriminated against.

The petitioner contended that there is no authority in the State courts to make a tax settlement against it, for the reason that the Supreme Court of the United States, Federal questions having been raised, upon appeal held that the statute was void because discriminatory, that such decision of the Federal court was final and that there was no authority in the State courts to amend the statute by allowing additional deductions, that the allowance of such additional deductions was judicial legislation in violation of Section 1, Article IX, and Section 1, Article II, of the Constitution of Pennsylvania and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

The petitioner contended that under the decision and mandate of the Supreme Court of the United States judgment should have been entered for the petitioner with costs.

The petitioner raised the Federal questions sought to be reviewed before the Department of Revenue, the Department of the Auditor General and the Board of Finance and Revenue of the State of Pennsylvania and in its appeal from the settlement of tax to the Court of Common Pleas of Dauphin County (R. 4a-18a), in the exceptions filed to the conclusions of law, rulings on requests for conclusions of law and the judgment directed to be entered by such court (R. 85a-103a), in its appeal to the Supreme Court of the State of Pennsylvania, Middle District, No. 19, May Term, 1934, and in its appeal to the Supreme Court of the United States, October Term, 1935, No. 3. (See Transcript of Record, Supreme Court of the United States, October Term, 1935, No. 3, statement of questions involved in the Supreme Court of Pennsylvania and assignments of error in the Supreme Court of Pennsylvania, pp. 72-90, (296 U. S. 113).) These questions were raised also before the Dauphin County Court to whom the mandate of the Supreme Court of the United States had been referred by the Supreme Court of Pennsylvania (see Record, *Commonwealth of Pennsylvania* v. *Schuylkill Trust Company*, Supreme Court of Pennsylvania, Middle District, No. 35, May Term, 1937, Demurrer filed by the petitioner, pp. 136a-143a; Exceptions of Defendant, petitioner, to the findings, conclusions of law and judgment directed to be entered by the Dauphin County Court, pp. 183a-208a; Additional Exceptions of Defendant, petitioner, pp. 217a-218a), and in its appeal to the Supreme Court of Pennsylvania, Middle District, No. 35, May Term, 1937 (see Brief of appellant, petitioner, filed in such appeal, Statement of Questions Involved, p. 1 and Assignments of Error filed in such appeal, pp. 7-43, incl.).

The petitioner believes and therefore avers that the said State statute of April 25, 1929, Pamphlet Laws 673, under authority of which the State Supreme Court entered its final judgment against the Schuylkill Trust Company is unconstitutional and void and has been held to be unconstitutional and void by the Supreme Court of the United States in this same case by its decision filed November 11, 1935 (296 U. S. 113), that the judgment entered by the said State Supreme Court violates the mandate of the Supreme Court of the United States issued in such case and that the construction and application of the said State statute embodied in the judgment entered against the petitioner by the State Supreme Court under the alleged authority of the said State statute constitute judicial legislation and are repugnant to the hereinbefore recited provisions of the Constitution of the State of Pennsylvania, the Constitution of the United States and the statutes of the United States, constitute a taxation of and a discrimination against obligations, securities and instrumentalities of the United States Government and violate Section 1 of Article IX and Section 1 of Article II of the Constitution of the State of Pennsylvania, Clause 2 of Section 8 of Article I of the Constitution of the United States which gives to the Congress of the United States the power to borrow money on the credit of the United States and constitute a deprivation of property without due process of law and a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and the decisions of the Supreme Court of the United States, in particular the decisions of such court in the cases of *Schuylkill Trust Company, Appellant,* v. *The Commonwealth of Pennsylvania,* 296 U. S. 113 (1935); *Missouri* v. *Gehner,* 281 U. S. 313 (1930); *MacAllen Co.* v. *Mass.,* 279 U. S. 620 (1929); *Bank of California* v. *Richardson,* 248

S. 476 (1919), and *Corry* v. *Baltimore*, 196 U. S. 466 05).

E.

Cases Believed to Sustain Jurisdiction.

he following cases decided by the Supreme Court of United States are believed to sustain the jurisdiction:

Schuylkill Trust Company, Appellant, v. *The Commonwealth of Pennsylvania* (November 11, 1935), 296 U. S. 113;

Missouri v. *Gehner* (April 14, 1930), 281 U. S. 313;

MacAllen Co. v. *Mass.* (May 27, 1929), 279 U. S. 620;

Bank of California v. *Richardson* (January 27, 1919), 248 U. S. 476;

St. Louis, I. Mt. & So. Ry. Co. v. *Starbird* (April 30, 1917), 243 U. S. 592;

Corry v. *Baltimore* (February 20, 1905), 196 U. S. 466;

Carter v. *Texas* (April 16, 1900), 177 U. S. 442, 447.

Respectfully submitted,

JOHN ROBERT JONES,
Counsel for Appellant-Petitioner.

hiladelphia, Pennsylvania, August 16, 1937.

EXHIBIT "A".

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(213)

IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT.

MAY TERM, 1937.

Nos. 35, 36.

COMMONWEALTH OF PENNSYLVANIA

v.

SCHUYLKILL TRUST COMPANY, *Appellant.*

COMMONWEALTH OF PENNSYLVANIA, *Appellant,*

v.

SCHUYLKILL TRUST COMPANY.

Appeals from Final Judgment of Court of Common Pleas of Dauphin County, in No. 61, Commonwealth Docket, 1933.

Opinion of the Court.

Filed Jun. 25, 1937.

STERN, J.

From a judgment of the Court of Common Pleas of Dauphin County fixing the settlement of the tax on shares of capital stock of defendant, a trust company, for the year 1930, both Commonwealth and defendant have appealed. The controversy was previously in this court (Commonwealth *v.* Schuylkill Trust Company, 315 Pa. 429) but on two of the questions involved an appeal was taken by defendant to the Supreme Court of the United States.[1] They

[1] The appeal was also as to the right of the Commonwealth to tax shares of stock of defendant owned by residents of States other than Pennsylvania, but the Supreme Court did not pass upon this question. It was decided—contrary to defendant's contention—in 315 Pa. 429.

were: (1) Whether a deduction from the appraisement on which the tax was assessed should be made for the value of shares of national bank stock held by defendant; (2) Whether a discrimination against United States government securities arose from the fact that their value was not deducted from the appraisement, although deductions were made for investments in "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares," as provided by the Acts of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673, which amended the original act of June 13, 1907, P. L. 640.[2]

As to the first question, the Supreme Court held (*Schuylkill Trust Company* v. *Pennsylvania*, 296 U. S. 113) that the national bank stock having been taxed to the bank's shareholders by the Act of July 15, 1897, P. L. 292, as amended by the Act of April 25, 1929, P. L. 677, it could not again be taxed to defendant's stockholders: R. S. § 5219, 12 U. S. C. A. § 548; *Bank of California* v. *Richardson*, 248 U. S. 476. On this point there can be no further controversy.

As to the second question, the Supreme Court stated that "The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal government."[3] But because of the statutory deductions of the value of stocks already taxed or relieved from taxation by the state, no similar deduction being provided for in the case of United States securities, it "is impossible to avoid the conclusion" that the law

[2] There were further amendments to the Act of 1907 by the Acts of May 31, 1933, P. L. 1132, and July 28, 1936, Spec. Sess. P. L. 73, which finally eliminated all deductions from the amount of capital stock paid in, surplus and undistributed profits, in ascertaining the value of the shares for taxation.

[3] See *Van Allen* v. *The Assessors*, 3 Wall. 573; *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 112; *Educational Films Corporation* v. *Ward*, 282 U. S. 379, 390.

works a discrimination against such securities. The court therefore remanded the cause "for further proceedings not inconsistent with this opinion." Mr. Justice CARDOZO filed a dissenting opinion, concurred in by Mr. Justice BRANDEIS and Mr. Justice STONE, in which he said that the Pennsylvania statutes were not passed as acts of " 'unfriendly discrimination' • • • against the national securities, nor • • • in aid of classes of investments with which the national securities are in substantial competition. • • • Assuming such a discrimination, I do not understand that any mandate is laid by this court upon the Supreme Court of Pennsylvania as to the choice between two methods of avoiding or correcting it. • • • If the state maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, even at the price of enlarging the deductions. *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 247. On the other hand, it may cancel the deductions altogether, annulling the amendatory acts in so far as they prescribe a new method of valuation and going back in that respect to the law previously in force. In that event the tax to be paid by the appellant will be increased instead of lessened. The choice between these curative measures must be made by the state court."

The case being again before the Common Pleas of Dauphin County, that court rendered opinions, through President Judge HARGEST, (42 Dauphin Co. Rep. 317; 43 Dauphin Co. Rep. 258 and 261, and, in the companion case of *Commonwealth* v. *Girard Trust Company*, 42 Dauphin Co. Rep. 299), which are so comprehensive and self-vindicating that what here follows is more by way of restatement than of profitable addition. The court held that the effect of the United States Supreme Court decision was not wholly to invalidate the amendatory acts of 1923, 1927 and 1929, but merely to require, in the appraisal of the shares of stock of trust companies, that securities of the United States government be put upon the same favorable basis, by way of deduction from the tax valuation, as the investments eliminated under the specific provisions of those acts.

There are three possible solutions of the problem left open by the decision of the Supreme Court: one, urged by

the Commonwealth on its appeal; a second, urged by defendant on its appeal; the third, adopted by the court below.

1. The contention of the Commonwealth is that the Supreme Court held the amendatory acts of 1923, 1927 and 1929 unconstitutional, leaving the original act of 1907 unaffected,[4] and that the tax settlement of defendant's shares of stock should therefore be made in accordance with that act, which allowed no deductions whatever. It maintains that the proviso in the Act of 1907 which gave permission to a trust company paying the tax before the first of March to deduct investments in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, was merely the allowance of a discount for prompt payment, but that even if it were held to be unconstitutional as involving the same discrimination against United States securities as that brought about by the amendatory acts, its invalidity would not affect the remainder of the Act of 1907. Thus it is the Commonwealth's position that the discrimination should be remedied, not by allowing a deduction of the United States securities, but by eliminating the deductions granted by the amendatory acts.

2. Defendant agrees with the Commonwealth that the amendatory acts were completely nullified by the Supreme Court decision, but argues that the "discount" proviso of the Act of 1907 is also invalid, and that it cannot be amputated without destroying the act itself, severability being impossible because of the interdependence of the proviso and the body of the act.[5] Defendant further argues that the Act of 1907 is invalid even apart from the proviso, because it fails to exclude from the tax appraisement the value of the shares of stock of national banks, and therefore, on the Commonwealth's theory that such an exclusion cannot be "judicially" created, the Act of 1907 is incapable of constitutional application. The result would be that no statute would remain under which defendant's stock could be taxed.

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[4] *Eberle* v. *Michigan*, 232 U. S. 700, 705; *Truax* v. *Corrigan*, 257 U. S. U. S. 312, 342; *Davis* v. *Wallace*, 257 U. S. 478, 485.

[5] *Booth & Flinn, Ltd.*, v. *Miller*, 237 Pa. 297, 309; *Commonwealth* v. *Humphrey*, 288 Pa. 280, 290.

3. The court below approved of neither of these extreme positions, but adopted the intermediate course of holding that, since the Supreme Court had decided that the amendments to the Act of 1907, as interpreted by the state courts, imposed an unconstitutional tax upon securities of the United States government, the remedy was, not to declare these statutes invalid, but to limit their application by implying a legislative intent to exclude such securities. The court pointed out that this method of interpretative adaptation of a statute to constitutional requirements, far from being unique, has been regularly employed, and illustrations of its use are abundantly to be found in the decisions construing various other tax statutes.[6] For example, if an act imposes a tax upon various articles or subjects, and it cannot constitutionally be sustained as to one or more of them, the statute is not thereby invalidated as a whole, unless, of course, it clearly appears that the legislature would not have passed the act as thus reduced in scope. This is not "judicial legislation," nor does it involve a "rewriting" of statutory enactments; it adds nothing to the legislative provisions; it merely enforces them to the extent possible in view of constitutional limitations.[7] "A presumption of much importance in this country, . . . is that a legislative intent to violate the constitution is never to be assumed, if the language of the statute can be satisfied

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[6] For example, in the case of the capital stock tax, *Commonwealth* v. *Standard Oil Co.*, 101 Pa. 119, 146; *Commonwealth* v. *Lackawanna Iron & Coal Co.*, 129 Pa. 346, 356; *Commonwealth* v. *Westinghouse Electric & Manufacturing Co.*, 151 Pa. 265; *Commonwealth* v. *Westinghouse Air Brake Co.*, 251 Pa. 12. In the case of the corporate loans tax, *Pittsburgh, Fort Wayne & Chicago Railway Co.* v. *Commonwealth*, 66 Pa. 73; *Commonwealth* v. *Barrett Manufacturing Co.*, 246 Pa. 301. In the case of the tonnage tax, *In re State Freight Tax*, 15 Wall. 232, 282. In the case of the inheritance tax, *Bittinger's Estate*, 129 Pa. 338, 345; *Frick* v. *Pennsylvania*, 268 U. S. 473. In the case of the mercantile license tax, *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292.

[7] In *Fidelity & Guaranty Fire Corporation* v. *Leser*, 190 Atl. 830, the Court of Appeals of Maryland held, in construing a statute of that State similar to the one here involved, that the deductions prescribed in the statute could not be allowed in view of the Supreme Court decision in the present case. In the Maryland act, however, there was a clause that "if any exemption or exception from any tax is held invalid, the tax shall apply without such exemption or exception."

by a contrary construction": Endlich, *Interpretation of Statutes*, § 178. "It is a safe and wholesome rule . . . to regard as excepted by necessary implication from even the most express and absolute general provisions, all cases to which a statute cannot constitutionally apply": *Idem*, § 179.

We are of opinion, therefore, that the decision of the court below constitutes the proper solution of the problem involved.

As to the method or formula employed to determine what part of the non-taxable investments are included within the capital stock structure, there is no serious complaint made by defendant, nor could there be in view of the previous decisions of this court. In *Commonwealth* v. *Hazelwood Savings and Trust Co.*, 271 Pa. 375, it was held that if a trust company purchases the non-taxable securities out of its paid-in capital stock, surplus and undivided profits, the entire value thereof should be deducted, but if out of its other assets, no part of their value is deductible, and that the burden is upon the company to prove that it did purchase the securities out of its capital stock account, and, if it fails to establish that fact, the Commonwealth may, perhaps, refuse to allow any deduction whatever; if, therefore, instead of doing this, the Commonwealth adopts the more equitable course of apportioning the value of the non-taxable securities between the two funds, the trust company has no just cause for complaint. The same method of apportionment was approved by this court when the present case was previously before it: *Commonwealth* v. *Schuylkill Trust Co.*, 315 Pa. 429, and again in *Commonwealth* v. *Provident Trust Co. of Philadelphia*, 319 Pa. 385.[8]

The judgment is affirmed.

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[8] The formula is as follows: The numerator consists of the capital paid in, surplus, and undivided profits, determined by the book values, less the book value of those investments, if any, for which a full deduction has been made. The denominator consists of the book values of the permanent investments, less the book value of those investments, if any, for which a full deduction has been made. The multiplicand is the book value of the shares and securities which are to be apportioned. The result thus obtained is increased or diminished by the amount of appreciation or depreciation in the shares and securities apportioned.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 447

SCHUYLKILL TRUST COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

MOTION TO ADVANCE.

Now comes the appellant, by John Robert Jones, its counsel, who respectfully moves the Court to advance the above case on the docket of the Court and grant as early a hearing as possible therein for the following reasons:

1. That the matter at issue involves the imposition and collection of taxes by the Commonwealth of Pennsylvania imposed under and by the provisions of the Act of the General Assembly of the Commonwealth of Pennsylvania approved April 25, 1929, Pamphlet Laws 673.

2. That in a suit between the same parties wherein the instant appellant was the appellant this Court held the said State statute to be discriminatory and void and reversed the judgment of the Supreme Court of the Commonwealth of Pennsylvania (*Schuylkill Trust Company, Appellant,* v. *The Commonwealth of Pennsylvania,* 296 U. S. 113).

3. That the instant appeal is an appeal from the final decision of the Supreme Court of the Commonwealth of Pennsylvania, which court, under the alleged authority of the mandate of this Court issued in the cited case, affirmed a judgment of the Dauphin County Court of Common Pleas imposing a tax under the authority of the said State statute of April 25, 1929, Pamphlet Laws 673.

4. That the decision of this Court in the cited case was filed November 11, 1935 (296 U. S. 113). That the Dauphin County Court, to which the mandate of this Court had been remitted by the Supreme Court of the State of Pennsylvania, upon April 20, 1936, entered a judgment against this appellant for tax in the amount of $1,457.03 under the alleged authority of the said mandate and State statute of April 25, 1929, Pamphlet Laws 673. That the appellant within the thirty-days' period from said April 20, 1936, the statutory period provided by the law of Pennsylvania, filed exceptions to the judgment of the said court. That the said Dauphin County Court disposed of the said exceptions and entered its final judgment against the appellant upon January 22, 1937 (42 Dauphin County Repts. 317; 43 Dauphin County Repts. 258, 260), in the amount of $1,441.39, whereupon this appellant took an appeal to the Supreme Court of the State of Pennsylvania, which latter court filed its decision affirming the judgment of the lower court June 25, 1937 (193 Atlantic Reporter 638).

5. That the said judgment of $1,441.39 entered by the Dauphin County Court upon January 22, 1937, which judg-

ment was affirmed by the State Supreme Court June 25, 1937, consisted of tax claimed to be owing to the Commonwealth of Pennsylvania in the amount of $1,385.42 upon which interest was calculated and added from April 8, 1933, to January 22, 1937, in the amount of $314.95, making a total of $1,700.37, upon which amount of tax and interest an Attorney General's commission was calculated at the rate of five per centum in the sum of $85.02, making a total amount claimed by the Commonwealth under authority of the said statute and the mandate of this Court in the amount of $1,785.39, from which latter sum the costs allowed to the appellant under the mandate of this Court in the amount of $344.00 were deducted, leaving a total balance claimed by the Commonwealth and for which judgment was entered against this appellant in the amount of $1,441.39.

6. That the delay and failure of the State courts to enter judgment for the appellant with costs and to make payment of costs to the appellant as directed by the mandate of this Court and the increasing and continued interest charges and costs of litigation work a hardship and impose a burden upon this appellant.

JOHN ROBERT JONES,
Counsel for the Appellant.

Served the above upon the Commonwealth of Pennsylvania, appellee, by mailing a copy thereof to Manuel Kraus, Esq., Deputy Attorney General, Department of Justice, State Capitol, Harrisburg, Pennsylvania, by first class mail September 25, 1937.

JOHN ROBERT JONES,
Counsel for the Appellant.